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## **The Constitutional Protection of Religious Liberty in the United States**

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### **Abstract**

Religious liberty is a favored value under the United States Constitution. The Constitution provides two-fold protection to religious liberty by means of the Establishment Clause and the Free Exercise Clause. The Establishment Clause, sometimes referred to as the separation of church and state, requires that the government maintain a course of complete official neutrality toward religion. The government cannot favor one religion over another, nor can it favor religion over non-religion. The Free Exercise Clause is a textual guarantee of peoples' right to practice their religion and to hold and act on religious beliefs. The First Amendment's guarantee of freedom of speech provides some additional protection to religious speech and to the right of religious adherents to spread the message of their faith.

In this paper, I will first explain how the Establishment Clause protects religious liberty, especially that of minority religions and non-believers, against governmental action benefitting more conventional religion. I will then discuss the additional, if somewhat limited, protection of religious liberty under the Free Exercise Clause and the protection of religious speech under the First Amendment.

The most interesting part of the paper will discuss the interaction between the Establishment Clause and the Free Exercise Clause. Specifically, it will discuss how the government can include the religious with the secular in the distribution of governmental benefits, and how the government can take action that is precisely tailored to protect the religious liberty of individuals and religious institutions.

### **Introduction: The Two-Fold Constitutional Protection of Religious Liberty**

Religious liberty is a favored value in the American constitutional system. It is the first guarantee of the First Amendment, which provides that there shall be "[n]o law respecting the establishment of religion or prohibiting the free exercise thereof."<sup>1</sup> The First Amendment was enacted against the background of an established church in Great Britain during the colonial period and the official persecution of religious dissenters in Great Britain and colonial America.<sup>2</sup> It provides a two-fold protection to religious liberty by what we refer to as the "religion clauses." The Establishment Clause protects against the "establishment" of an official church by the government and against governmental action "establishing religion," while the Free Exercise clause is a textual guarantee of peoples' right to practice their religion and to hold and act on

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<sup>1</sup> U.S.CONST.amend. I. While the guarantees of the Bill of Rights by their terms apply only to the federal government, the major guarantees of the Bill of Rights, such as the religion clauses, have been incorporated into the "liberty" protected by the Fourteenth Amendment's due process clause, and so apply equally to the states. See the discussion in the concurring opinion of Justice William Brennan in *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 230-234 (1963) (Brennan J., concurring).

<sup>2</sup> See the discussion of the historical background of the religion clauses of the First Amendment in *Everson v. New Jersey*, 330 U.S. 1, 8-14 (1947).

religious beliefs, free from governmental interference.<sup>3</sup>

The two-fold protection of religious freedom under the American Constitution is a distinctly American phenomenon. It is possible in a democratic society for governmental establishment of religion to coexist fully with religious liberty. This is clearly the situation in Great Britain. Under British law, the Church of England and the Church of Scotland are the officially established national churches. As a legal matter, the government is extensively involved in the affairs of the Church of England, and to a limited extent in the affairs of the Church of Scotland.<sup>4</sup> Government funds may be provided for the support of the national churches, and the government aids other religions by providing substantial public funds to sectarian schools.<sup>5</sup> All state-supported schools, sectarian and non-sectarian are required to provide religious education and a daily act of worship.<sup>6</sup> Ecclesiastical courts are a part of the British legal system, and in appropriate cases, the civil courts will decide questions of ecclesiastical law.<sup>7</sup> In addition, the British courts have the power to strike down religiously-based

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<sup>3</sup> As the Supreme Court has stated: "The structure of our government has, for the preservation of religious liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority." *Everson, supra*, note 2 at 15.

Religious liberty means liberty with respect to religious belief - the belief in the existence or non-existence of a Supreme Being, and the nature and manifestation of such existence. In this sense, all people, secularists, atheists and agnostics, as well as religious adherents, have religious beliefs, and the religion clauses protect peoples' liberty with respect to those beliefs.

<sup>4</sup> The Act of Settlement, 1700 12 & 13 Will 3 c2, secs. 2,3, requires that the Monarch must be in communion with the Church of England and that the Monarch cannot marry a Catholic. The Archbishops of Canterbury and York, and 24 senior diocesan bishops sit as voting members of the House of Lords. The Archbishops and bishops are appointed by the government, and Parliament has the legal power over all matters affecting the church, including doctrine, liturgy, and church property. Since 1919, Parliament has ceded substantial control over these matters to the Church Assembly. Church of England Assembly (Powers) Act, 1919, 9 & 10 Geo 5 c 76. For an interesting case discussing the relationship between the Church of England and the government in the context of a challenge to the Church of England's decision to ordain women, see *The Revd Williamson v. The Archbishop of Canterbury and Others*, Court of Appeal (Civil Division) (Transcript: Smith Bernal), 5 September 1996. For a comprehensive discussion of the relationship between the government and the Church of England, see James W. Torke, *The English Religious Establishment*, 12 J.L. & RELIGION 399 (1995-1996).

The reciprocal Acts of Union between England and Scotland, passed by the English Parliament, Union with Scotland Act 1706 (6 Anne, c.11) (Parliament of England) and the Scottish Parliament, Union with England Act 1706 (Anne, c7) (Parliament of Scotland) established the Presbyterian Church (Kirk) as the official Church of Scotland. Various provisions of these Acts have subsequently been repealed, and today to a large extent the Church of Scotland is substantially free from control by either the United Kingdom or Scottish Parliament. See the discussion in Frank Cranmer, *Church State Relations in the United Kingdom: a Westminster View*, ECC L.J. 2001, 6 (29), 111, 116-120; Norman Bonney, *The Monarchy, the State and Religion: Modernising the Relationships*, THE POLITICAL QUARTERLY, vol. 81, no. 2, April-June 2010.

<sup>5</sup> See the discussion of governmental funding of sectarian schools in *R v. Governing Body of JFS and the Admission Panel of JFS and Others*, [2009] UKSC 15, 63-65 (Judgment of Lord Hope), [2010] IRLR 136. See also the discussion in Torke, *supra*, note 4 at 424-425.. Professor Torke explains that virtually all schools are state-supported in varying degrees. County schools are wholly state funded

<sup>6</sup> See the discussion in Torke, *supra*, note 4 at 425-426. Upon parental request, students may be withdrawn from religious instruction or acts or worship, and teachers may be excused from mandatory attendance or participation in religious classes or observances. In England and Wales, students 16 years of age and older may opt out the daily act of worship. See John Swaine, "Allowing Pupils to Opt Out of School Prayer is Wrong, Says Archbishop of Wales," <http://www.telegraph.co.uk/news/newstopics/religion/598871/Allowing-pupild-to-opt-out...>, 07 Aug 2009.

<sup>7</sup> See the discussion in Torke, *supra* note 4 at 418-419.

decisions of religious institutions when they found those decisions to be violative of national anti-discrimination laws.<sup>8</sup> At the same time, Great Britain affirmatively protects religious liberty by its enactment of human rights laws and its adherence to the European Convention on Human Rights, much in the same way and to the same extent as religious liberty is protected under the Free Exercise Clause in the United States.<sup>9</sup> Similarly, in Canada, the Charter of Rights and Freedoms contains a freedom of conscience and religion clause, but no establishment clause. The reason for this distinction is that in Canada the government continues to support Protestant and Catholic religious schools as part of the pact between the Founding Nations at the time of Confederation.<sup>10</sup>

The approach to the protection of religious liberty in the United States differs significantly from the approach to the protection of religious liberty in Great Britain and Canada because of the Establishment Clause. The Establishment Clause not only prohibits the federal and state governments from establishing an official church, but also prohibits any financial assistance of any kind to religious institutions for religious purposes.<sup>11</sup> In addition, the

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<sup>8</sup> See *R. v. Governing Body of JFS and Admission Panel of JFS and Others*, *supra*, note 5. In that case, an Orthodox Jewish sectarian school, which was oversubscribed, gave precedence in admission to those children recognized as Jewish by the Chief Rabbi of the United Hebrew Congregation of the Commonwealth. The Chief Rabbi recognized a child as Jewish only if the child was born to a Jewish mother or a mother who had converted to Judaism in accordance with Orthodox requirements. The child who was denied admission had a Jewish father and a non-Jewish mother who converted to Judaism under the supervision of a non-Orthodox synagogue. The Supreme Court of the United Kingdom held in a 5-4 decision that the schools refusal to admit the child constituted impermissible discrimination on the basis of ethnic origin, in violation of the Race Relations Act of 1976.

<sup>9</sup> For illustrative cases upholding religious liberty challenges to governmental action, see *e.g.*, *R (on the application of SB) v. Governors of Denbigh High School*, 2 All ER 396 [2005], 2005 EWCA Civ 1999 (school could not require student to wear school uniform instead of jilbab, which she claimed was required by her Moslen religion); *R (on the application of Suryananda) [2007] EWHC 1736 (Q.B.Admin)* (Proposed slaughter of bullock solely on basis of bullock's testing positive for bovine tuberculosis violated religious liberty of Hindu community).

For illustrative cases rejecting religious liberty challenges, see *e.g.* *Laderle v. London Borough of Islington*, [2009] EWCA Civ 1357, [2009 All ER (D) 148 (Dec)] (Religious liberty of committed Christian Registrar of Births, Deaths and Marriages was not infringed by requirement that she register civil partnerships); *Regina (Williamson and others) v. Secretary of State for Education and Employment* [2005] H.L. 15, [2005] 2 A.C. 246 (Religious liberty of Christian teachers was not violated by prohibition against use of corporal punishment on schoolchildren).

<sup>10</sup> See *Adler v. Ontario*, [1996] 3 S.C.R. 609, where the Supreme Court of Canada held that the refusal of a province to fund the religious schools operated by other religions did not violate the freedom of conscience and religion or the equality provisions of the Charter of Rights and Freedoms. For a recent case involving the conscience and religion clause, see *Alberta v. Hutterian Brethern of Wilson County*, 2009 SCC 37, [2009] 9 W.W.R. 189, 310 D.L.R.(4th 193 [2009], where the Supreme Court of Canada held in a 4-3, decision that the freedom of conscience and religion provision was not violated by a requirement that all drivers' licenses bear a photograph of the license holder, as applied to a member of a religious sect that objected on religious grounds to having their photographs taken.

<sup>11</sup> In *Everson*, *supra*, note 2 at 15-16, Justice Black stated as a core meaning of the Establishment Clause: "No tax, in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." I use the term, "financial aid for religious purposes" to refer to the financial assistance prohibited by the Establishment Clause. The Establishment Clause does not prohibit government funding to a religiously-affiliated institution, such as a hospital, that enables it to perform the secular purpose of providing care to hospital patients. It does not prohibit the government from providing some benefits to children attending sectarian schools along with children attending public schools, such as school transportation. And it does not prohibit the government from providing benefits to individuals who may choose to use them for religious purposes, as long as the same benefits are provided to individuals who choose to use them for

Establishment Clause also prohibits as an “entanglement” with religion, any judicial interference with religiously-based decisions of religious institutions.<sup>12</sup> More fundamentally, the Establishment Clause prohibits the federal and state governments from taking *any* action that “advances or inhibits religion”, such as school sponsored prayer or bible-reading in the public schools, or displays of purely religious symbols on public property.<sup>13</sup> In the United States then, as a matter of constitutional structure, we provide two-fold protection to religious liberty, both by prohibiting the government from “advancing or inhibiting religion” - the Establishment Clause requires that the government maintain a course of complete official neutrality toward religion<sup>14</sup> -

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secular purposes. See the discussion and review of cases in Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 WAYNE. L. REV. 1317, 1374-1399 (1997). See also *Zelman v. Simmons-Harris*, 536 U.S. 369 (2002), where the Supreme Court upheld a school voucher program for low-income children that provided a number of options for the parents, including using the vouchers to defray tuition at sectarian schools.

<sup>12</sup> See the discussion and review of cases in Sedler, *Understanding the Establishment Clause*, *supra* note 11, at 1409. The non-entanglement principle prohibits the civil courts from becoming involved with matters of religious doctrine or policy, and requires that they defer to the resolution of these issues by the highest tribunal of a hierarchical church authority. See *e.g.*, *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), rejecting a claim of Russian Orthodox persons living in the United States that the Russian Orthodox Church in America was not following the “true faith,” because it was under the control of the Patriarch of Moscow, who in turn was controlled by the government of the Soviet Union. For the same reason, a court cannot enforce a law prohibiting the fraudulent sale of kosher food, since the court would have to decide the religious question of whether the food had been prepared in accordance with Orthodox Jewish religious rules and dietary laws. See *e.g.*, *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337 (3d. Cir. 1995). If confronted with a case such as *R v. Governing Body*, *supra* note 8, an American court would rule that the anti-discrimination law could not constitutionally be applied to require a Jewish sectarian school to admit a student that it did not consider Jewish under its interpretation of Jewish law. *C.f.* *Equal Employment Opportunity Commission v. Catholic University of America*, 83 F.3d 455 (D.C.1996)), holding that the courts could not adjudicate a claim of sex discrimination brought by a Catholic nun who had been denied tenure in the Canon Law department of the Catholic University of America, a Vatican-chartered university, since the adjudication would interfere with the Church’s ability to make religious judgments about its officials.

<sup>13</sup> See the discussion, *infra*, notes 16-20, and accompanying text.

<sup>14</sup> “The established principle [is] that the government must pursue a course of complete official neutrality toward religion.” *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).

By way of comparison with other democratic nations, in France there is absolute separation of government and religion, and France is officially secular. The French word describing the official secularism is ‘*laïcité*.’ The December 9, 1905 Law Concerning Separation of Church and State specifically prohibits the state from officially recognizing or endorsing religious groups. The first article of the October 4, 1958 sets forth the secular principle: ‘France shall be an indivisible, secular democratic and social Republic. It shall insure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.’

The Pew Forum on Religion and Public Life, *100<sup>th</sup> Anniversary of Secularism in France*, <http://pewforum.org/Government/100th-Anniversary-of-Secularism-in-France.aspx>, Dec. 9, 2005. See also The Council of State and Administrative Jurisdiction, *A Century of Secularism - Public Report 2004*, <http://conseil-etat.fr/cde/node.php?articleid=406>. For a discussion of the historical context of the enactment of the Law Concerning Separation, see John McManners, *CHURCH AND STATE IN FRANCE* 129-175. S.P.C.K., London Eng. (1972).

In 2004, the French government adopted a law banning public school students from wearing “conspicuous” religious attire and symbols in school. In practice, this ban applied to Muslim headscarves, Sikh turbans, Jewish skullcaps, and large Christian crosses. *The Pew Forum*, *supra*. To the best of the author’s knowledge there are no such bans on the wearing of religious attire and symbols in American public schools, and if there were, it is very likely that the courts would hold that the ban violated the students free speech rights.

and by specifically guaranteeing religious freedom.<sup>15</sup>

### **The Establishment Clause as a Protector of Religious Liberty**

We will begin by focusing on the function of the Establishment Clause as a protector of religious liberty. When American courts strike down governmental action advancing religion as violative of the Establishment Clause, such as when they hold that the Establishment Clause prohibits school-sponsored prayer or bible reading in the public schools,<sup>16</sup> or that it prohibits the use of public funds for religious purposes,<sup>17</sup> the courts are not acting with hostility toward religion. Rather in terms of constitutional theory, they are acting to protect the religious liberty of all persons, and particularly the liberty of religious minorities. To illustrate, the religious liberty of some public school students could be impinged if they are forced to participate in teacher-led prayer or to suffer embarrassment by asking to be excused from class. Prohibiting teacher-led prayer thus protects the religious liberty of these students whose religious beliefs are impinged by a prayer that is imposed with the authority of the school. Because the imposition of teacher-led prayer has been held to violate the Establishment Clause, it is not necessary for the courts to decide whether or not this imposition violates the Free Exercise Clause.<sup>18</sup> The use of public funds to support one religion or some religions is prohibited by the Establishment Clause, because it is considered to violate the religious liberty of those who are non-believers or not members of the benefitted religions by the use of their money to support a competitive religious belief.<sup>19</sup> The display of a Christian religious symbol such as a Nativity Scene on a city hall front lawn has been held to violate the Establishment Clause on the ground that the display sends a message to non-Christians that their beliefs are not favored in that political community and that they are not full members of that community.<sup>20</sup>

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<sup>15</sup> As the Supreme Court has stated: “The Free Exercise Clause[s] purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.” *School District of Abington Township v. Schempp*, *supra*, note 1 at 223.

<sup>16</sup> See *Engel v. Vitale*, 370 U.S. 421 (1962); *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000); *School District of Abington Township v. Schempp*, *supra*, note 1.

<sup>17</sup> See *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).

<sup>18</sup> In Canada, it has been held that the imposition of such a requirements on public school students violates the freedom of conscience and religion clause of the Canadian Charter of Rights. See *Re Zylberberg and Director of Education of Sudbury Board of Education*, 65 O.R.2d 641 (Ontario Court of Appeal 1988).

<sup>19</sup> As the Supreme Court stated in *Everson v. New Jersey*, *supra* note 2 at 16: “No tax in any amount large or small can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”

<sup>20</sup> See *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989), and the concurring opinion of Justice O’Connor in *Lynch v. Donnelly*, 465 U.S. 668, 687, 688 (1984). However, these cases also hold that when a religious symbol is included as a part of a larger display consisting primarily of secular symbols, the effect of the display is not to send a message of endorsement of religion, and the display does not violate the Establishment clause. See also

*Van Norden v. Perry*, 545 U.S. 677 (2005), where the Court held that the inclusion of a Ten Commandments monument along with 17 other monuments and historical markers on the Texas State Capitol Grounds did not violate the Establishment Clause. But compare *McCreary County v. American Civil Liberties Union*, 545 U.S. 844 (2005), where the Court found that the Establishment Clause was violated by the posting of the Ten Commandments along

The underlying theory of the Establishment Clause then is that prohibiting the government from taking actions to advance or inhibit religion will serve to protect the religious liberty of all persons, and particularly the liberty of religious minorities. I think that this point is often not fully understood by religious believers, who may see such restrictions as demonstrating hostility to religion. Again it is not hostility to religion, but a structural concern for religious liberty in the United States that prohibits the government from using its power or its funds in any way to advance or inhibit religion. At least this is the theory of our Constitution.

Moreover, the fact that the Constitution prohibits the government from taking actions to advance or inhibit religion does not in any way violate the religious liberty of religious believers. It merely prevents religious believers from trying to enlist the power of the government to advance their own religious beliefs. They are free to advance those beliefs themselves without the assistance of the government and are also protected against governmental action interfering with their religious liberty. If parents want their children to learn to pray, they can teach their children themselves or attend religious worship with them. If they want their children to have a religiously-based education, they can send them to sectarian schools.<sup>21</sup> And even in the public schools, students who wish to pray may do so on their own and may form prayer clubs, which are entitled to equal access to school facilities along with other student groups.<sup>22</sup> And since, as we will see, the government may take action that is precisely tailored to protect the religious liberty of individuals and religious institutions. When students are required by their religion to pray during school hours, the school may, consistent with the Establishment Clause, excuse them from class and provide them with a place to pray.<sup>23</sup> Similarly, while public funds may not be used to support religion or religious institutions, religious people may use their own funds to do so and receive a tax break for so doing. In this regard, the Supreme Court has held that the Establishment Clause permits the government to include religious contributions and church-owned property, along with educational and charitable contributions and property, in a tax deduction or exemption.<sup>24</sup> And Christians wishing to celebrate Christmas with the display of

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with the Constitution and other legal documents in a government building, because the purpose of the officials in doing so was to advance religion.

<sup>21</sup> See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Court held in that case that the Fourteenth Amendment's due process clause protects the liberty interest of parents to choose private schools for the education of their children, so parents have a constitutionally-protected right to send their children to private schools, sectarian and non-sectarian.

<sup>22</sup> See *Board of Education v. Westside Community Schools*, 496 U.S. 226 (1990), and the discussion, *infra*, notes 69-70, and accompanying text.

<sup>23</sup> This is the longstanding practice of the Dearborn, Michigan Public Schools, which enroll a large number of Moslem students. I have confirmed this practice by a communication with a Dearborn Public Schools official.

<sup>24</sup> See *Mueller v. Allen*, 463 U.S. 388 (1983) (state tax deduction for educational expenses, most of which were taken by parents for tuition payments at sectarian schools); *Walz v. Tax Commission*, 397 U.S. 464 (1970) (property tax exemption for religious, educational and charitable institutions). Moreover, since the operative principle of the Establishment Clause is that the government must pursue a course of complete official neutrality toward religion, the government does not violate the Establishment Clause when it provides for the equal treatment of the religious and the secular in some circumstances, and again for the inclusion in some circumstances of the religious and the secular in the receipt of governmental benefits. See the discussion in Sedler, "*Understanding the Establishment Clause*," *supra*, note 11 at 1390-1399.

a Nativity Scene can place one on the front lawn of their homes or ask their church place one in front of the church.

The Establishment Clause also provides certain specific protections for religious institutions so that they are free to carry out their religious mission, and to this extent, the Establishment Clause affirmatively promotes religious liberty. Since the Establishment Clause prohibits the government from giving a preference for one religion over another, it has been held to be unconstitutional for a state to require the registration as a charitable organization of those religious groups that received more than half of their funds from non-members.<sup>25</sup> Moreover, under the Establishment Clause, the civil courts may not become involved with matters of religious doctrine, but must defer to the resolution of these issues by the highest tribunal of a hierarchial church authority.<sup>26</sup> Thus, the courts cannot interfere with the decisions of the appropriate ecclesiastical authority within the church as to what persons are entitled to serve as ecclesiastical officials.<sup>27</sup> Nor may they become involved in disputes between church factions over control over church property, with each group claiming to have the “true faith,” but must defer to the determination of which group has the “true faith” that has been made by the highest tribunal of a hierarchial church organization.<sup>28</sup> Similarly, both the Establishment Clause and the Free Exercise Clause invalidate laws that expressly discriminate against religion or against people because of their religious beliefs, such as a law that disqualifies members of the clergy from serving as legislators,<sup>29</sup> or a law requiring a declaration of a belief in the existence of God as a test for holding public office.<sup>30</sup>

Continuing with the principle of neutrality, not hostility toward religion, the Court has held that in some circumstances, the government does not violate the Establishment Clause when it includes the religious with the secular in the receipt of governmental benefits, and to this extent

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<sup>25</sup> *Larsen v. Valente*, 456 U.S. 228 (1982).

<sup>26</sup> This is a part of the non-entanglement principle of the Establishment Clause. See the discussion, *supra*, note 12, and accompanying text. As the Supreme Court stated in *Everson*, *supra* note 2 at 16: “Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice-versa.”

<sup>27</sup> See *Serbian Eastern Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929).

<sup>28</sup> See *Watson v. Jones*, 80 U.S. 679 (1871); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969). See also the discussion, *supra*, note 10. When the form of church organization is congregational rather than hierarchial, the courts may, consistent with the Establishment Clause, apply general principles of contract and property law to determine which of the contending factions is entitled to the church property. *Jones v. Wolf*, 443 U.S. 595 (1979).

<sup>29</sup> *McDaniel v. Paty*, 435 U.S. 618 (1978).

<sup>30</sup> *Torasco v. Watkins*, 367 U.S. 488 (1961). Art. VI, cl. 3 of the Constitution specifically prohibits a religious test as a qualification for holding federal office. The *Torasco* decision reaches the same result under the Establishment Clause and so this prohibition binds the states as well.

In *Church of the Lukumi Babaluaye v. City of Hialeah*, 508 U.S. 520 (1993), the Court found that a city’s enactment of a number of laws prohibiting “animal sacrifice” was directed against the Santeria religion, which practices “animal sacrifice” as an essential part of its religious beliefs. The Court then held that the challenged laws violated the Free Exercise Clause, because they had the impermissible purpose of interfering with the religious freedom of the Santerian adherents and could not be justified as being “narrowly tailored to advance a compelling governmental interest.”



the Court has interpreted the Establishment Clause in a manner that protects the religious liberty of individuals and religious institutions. Examples of the permissible non-discriminatory inclusion of the religious with the secular include providing tax exemptions for contributions to or for property owned by religious, charitable, and educational organizations;<sup>31</sup> allowing parents to take tax deductions for educational expenses, notwithstanding that most of the deductions will be taken for tuition payments made by parents who are sending their children to sectarian schools;<sup>32</sup> and allowing a blind student to use state payments provided to such students for educational purposes to attend a religiously-affiliated college in order to pursue a religious vocation.<sup>33</sup> Similarly, while the Establishment Clause prohibits the state from providing financial assistance to sectarian schools, it permits the state to provide many benefits to the children attending such schools. These benefits include bus transportation,<sup>34</sup> the loan of state-approved textbooks in secular subjects,<sup>35</sup> sign language interpreters,<sup>36</sup> diagnostic and remedial services,<sup>37</sup> and even instruction in “enrichment” secular subjects by public school teachers in the sectarian schools themselves.<sup>38</sup> Finally, the Court has held that providing students and religious groups with equal access to school buildings after hours and to other public facilities does not violate the Establishment Clause, so that the government is constitutionally required to provide such access under the First Amendment’s public forum doctrine.<sup>39</sup>

Let me summarize what I have said thus far about the Establishment Clause and the

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<sup>31</sup>Walz v. Tax Commission of City of New York, *supra*, note 24.

<sup>32</sup>Mueller v. Allen, *supra*, note 24.

<sup>33</sup>Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986).

<sup>34</sup>Everson v. Board of Education, *supra*, note 2.

<sup>35</sup>Board of Education v. Allen, 392 U.S. 236 (1968).

<sup>36</sup>Zoberst v. Catalina Foothills School District, 509 U.S. 1 (1993).

<sup>37</sup>Wolman v. Walter, 433 U.S. 229 (1977); Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980).

<sup>38</sup>Agostini v. Felton, 521 U.S. 203 (1997).

In Mitchell v. Helms, 530 U.S. 593 (2000), the Court upheld the constitutionality of a program under which public funds were used to purchase instructional equipment and materials, such as media material and computer software and hardware, that were loaned to children attending public and private schools, including children attending parochial schools. The Court was highly fragmented on the question of whether it was constitutionally permissible for public funds to be used in this way, with the “swing Justices” concluding that the program contained sufficient safeguards to prevent diversion of the instructional material for religious use.

In Zelman v. Simmons-Harris, *supra*, note 11, the Court was again highly fragmented, but held that in certain circumstances the state could provide tuition vouchers that school children could use at parochial schools. The program in that case provided a number of different forms of financial assistance to parents of low-income children attending poorly-performing public schools, including, along with the vouchers, attendance at “community” and “magnet” schools. The Court majority concluded that the program was one of “true private choice” and so did not violate the Establishment Clause.

<sup>39</sup>See Good News Club v. Milford Central School, 533 U.S. 98 (2001); Capitol Square Review Advisory Board v. Pinette, 515 U.S. 753 (1995). The public forum doctrine includes the First Amendment principle of content neutrality. That principle prohibits the government from discriminating against speech because of its content, and so prohibits the government from discriminating against religious speech. Thus, when the government opens up public facilities for use by people and organizations, under the public forum doctrine, it cannot exclude individuals or organizations because of the content of their speech. See the discussion, *infra*, notes 69-70, and accompanying text.

protection of religious liberty. First and most importantly, the underlying theory of the Establishment Clause is that prohibiting the government from taking actions to advance or inhibit religion will serve to protect the religious liberty of all persons, and particularly the liberty of religious minorities. Second, the Establishment Clause itself specifically provides certain protections to religious liberty, such as by invalidating laws that expressly discriminate against religion or against people because of their religious beliefs. Third, in some circumstances the government may, consistent with the Establishment Clause, include the religious with the secular in the receipt of governmental benefits, such as by providing many of the same benefits to students attending sectarian schools as it provides to students attending public schools.

### **The Role of the Free Exercise Clause**

We now turn to the Free Exercise Clause, which is a specific textual guarantee of peoples' right to practice their religion and to hold and act on religious beliefs, free from governmental interference. However, because the Supreme Court has interpreted the Establishment Clause very broadly, some of the protections for religious liberty that might otherwise have been dependent on the Free Exercise Clause have in fact been afforded by the Establishment Clause. For example, as pointed out earlier, it has not been necessary for the Court to decide whether school-sponsored prayer in the public schools violates the Free Exercise rights of non-believers and religious minorities, since school-sponsored prayer violates the Establishment Clause.<sup>40</sup> The same observation may be made with respect to the interference with the religious liberty of non-believers and religious minorities that would be caused by the use of public funds to support a competitive religious belief<sup>41</sup> and the interference with the religious liberty of non-Christians caused by the display of a Nativity Scene on a city hall front lawn<sup>42</sup>. Indeed, as a general proposition, we may say that any determination that governmental action has violated the Establishment Clause has necessarily subsumed any claim that such action violates the Free Exercise Clause. This is one of the reasons why the Establishment Clause has supplanted the Free Exercise Clause as the primary means of protecting religious liberty under the American Constitution.

What then is the role of the Free Exercise Clause in protecting religious liberty under the American Constitution? First, as we have pointed out previously, the Free Exercise Clause invalidates laws that expressly discriminate against religion or against people because of their religious beliefs, such as a law that disqualifies members of the clergy from serving as legislators, or a law requiring a declaration of a belief in the existence of God as a test for holding public office.<sup>43</sup> In the same vein, the Court has invalidated under the Free Exercise Clause, a municipal ordinance prohibiting "animal sacrifice," which, the Court found, was directed against the Santeria religion, which practices "animal sacrifice" as an essential part of its

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<sup>40</sup> See the discussion, *supra*, note 16, and accompanying text.

<sup>41</sup> See the discussion, *supra*, note 19, and accompanying text.

<sup>42</sup> See the discussion, *supra*, note 20, and accompanying text.

<sup>43</sup> See the discussion, *supra*, notes 29-30, and accompanying text.

religious beliefs.<sup>44</sup> Second, the Free Exercise Clause provides a textual basis for challenging truly neutral laws - laws that cannot be challenged as violating the Establishment Clause - that impact on a person's religious beliefs or practices by (1) compelling people to do something that their religion forbids, such as a requirement of compulsory school attendance applied to a religious group whose religion prohibits children from attending school beyond a certain age,<sup>45</sup> or (2) forbidding people from doing something that their religion requires, such as a law forbidding the use of illegal drugs as applied to a religious group such as the Native American Church whose religion requires the use of peyote in their religious services,<sup>46</sup> or (3) a law that imposes a burden on a person because of that person's religious beliefs, such as a law denying unemployment compensation to persons who are not available for Saturday work, as applied to a Sabbatarian who is unable to work on Saturday because of religious beliefs.<sup>47</sup>

The Court, however, has been reluctant to interpret the Free Exercise Clause too expansively, lest it end up with a Free Exercise-mandated exemption from laws of general application. Indeed, in the very first case involving a constitutional challenge under the Free Exercise Clause, *Reynolds v. United States*,<sup>48</sup> decided in 1879, the Court held that the federal law prohibiting polygamy did not violate the free exercise rights of a Utah polygamist. In the much more recent case of *Employment Division v. Smith*,<sup>49</sup> decided over 100 years later, the Court held that as a general proposition the Free Exercise Clause did not require that the government exempt religiously-motivated conduct from neutral and generally applicable criminal laws. This being so, in that case, the Court held that the government could constitutionally prohibit the use of peyote in the religious services of the Native American Church. Along these lines, the Court has upheld the following applications of facially neutral laws against Free Exercise challenge: a law requiring the payment of social security taxes as applied to members of a traditional religious community whose religion prohibited both the payment of social security taxes and the receipt of social security benefits;<sup>50</sup> a law denying a federal tax exemption to a private schools, such as Bob Jones University, that practiced racial discrimination on the basis of sincerely held religious beliefs;<sup>51</sup> a law requiring compulsory military service by persons who opposed a particular war -

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<sup>44</sup> See the discussion, *supra*, note 30, and accompanying text..

<sup>45</sup> See *Wisconsin v. Yoder*, 406 U.S. 205 (1972), holding that the state could not constitutionally apply its compulsory school attendance law to require secondary school attendance by children of a traditional religious community, the Old World Amish, whose religion forbade education beyond the primary level. The Court found that compliance with the requirement would seriously interfere with the community's religiously-based way of life, and that education beyond the primary level was not necessary to enable the children to function within that way of life. The decision thus was based on facts very specific to that religious community, and has not had any broader application.

<sup>46</sup> See *Employment Division v. Smith*, *infra*, note 49, where the Court held that the application of this law to prohibit the use of peyote by the Native American Church in its religious services did not violate the Free Exercise Clause.

<sup>47</sup> See the discussion, *infra*, notes 54-55, and accompanying text, and the cases cited therein.

<sup>48</sup> 98 U.S. 145 (1879).

<sup>49</sup> 494 U.S. 872 (1990).

<sup>50</sup> *United States v. Lee*, 455 U.S. 252 (1982).

<sup>51</sup> *Bob Jones University v. United States*, 461 U.S. 574 (1983).

instead of all war - on the basis of conscience and religion;<sup>52</sup> and a military dress regulation, since withdrawn, that prohibited an Orthodox Jewish officer from wearing a skullcap, in accordance with his religious beliefs.<sup>53</sup>

The Court has been somewhat more receptive to Free Exercise claims that compliance with a facially neutral law imposes a burden on a particular person because of that person's religious beliefs, and in these cases, the Court has discounted the importance of the government's interest in imposing the particular restriction. In a series of cases, the Court has held that the government cannot condition the availability of unemployment compensation upon a person's willingness to work under conditions forbidden by that person's religion, such as requiring a Sabbatarian to be available for Saturday work,<sup>54</sup> or requiring a person to work in weapons production, contrary to his newly-acquired religious beliefs.<sup>55</sup> The Court has also held that a state could not constitutionally deny welfare benefits to a family that had refused on religious grounds to furnish their governmentally-assigned social security number to the welfare officials, since the welfare officials could require other means of identification.<sup>56</sup>

But even here, the Court has interpreted the Free Exercise Clause narrowly. During the time of Sunday closing laws, it upheld against Free Exercise challenge a requirement that a person who observed the Sabbath on Saturday and thus closed his place of business on that day, comply with the state's Sunday closing law, designed to achieve a uniform day of rest for all employees.<sup>57</sup> It has also rejected a Free Exercise challenge to the refusal of prison authorities to excuse inmates from work requirements so that they could attend religious services,<sup>58</sup> and has held that the Free Exercise Clause did not preclude the federal government from carrying out logging and road construction in a national forest, although this would seriously interfere with the use of the forest for religious purposes by Native-American groups.<sup>59</sup>

We see then that the Free Exercise Clause provides some protection against the application of facially neutral laws that interfere with or burden an individual's liberty to act on the basis of religious beliefs. On the whole, however, the Court has not been willing to impose Free Exercise-required exemptions from the application of facially-neutral and generally applicable laws, and for this reason as well as the subsuming of some Free Exercise claims by the Establishment Clause, the protection provided to religious liberty by the Free Exercise Clause is considerably less than the protection provided by the Establishment Clause.

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<sup>52</sup> *Gillette v. United States*, 401 U.S. 437 (1971).

<sup>53</sup> *Goldman v. Weinberger*, 475 U.S. 503 (1986). Congress has since enacted a law overturning the regulation.. See note 89, *infra*.

<sup>54</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963); *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987).

<sup>55</sup> *Thomas v. Review Board of Indiana Security Division*, 450 U.S. 707 (1981).

<sup>56</sup> *Bowen v. Ray*, 476 U.S. 693 (1986).

<sup>57</sup> *Braunfeld v. Brown*, 366 U.S. 599 (1961).

<sup>58</sup> *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

<sup>59</sup> *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).

## The Protection of Religious Speech Under the First Amendment

Freedom of speech is also a very favored value in the American constitutional system. It is fair to say that under the First Amendment, the United States gives more constitutional protection to freedom of speech than is provided under the constitutions of other democratic nations and under international human rights norms.<sup>60</sup> This being so, it follows that there is very extensive protection to religious speech, as there is to all speech, under the First Amendment.

The constitutional protection of religious speech under the First Amendment manifests itself in two ways. First, religious groups may assert First Amendment challenges to laws and practices that interfere with their expression of and adherence to their religious beliefs. Some of these laws and practices could be challenged as violative of the Free Exercise Clause, but by casting the claim as one of freedom of speech, the claim becomes much stronger because it is supported by First Amendment free speech doctrine.<sup>61</sup> Second, the First Amendment principle of content neutrality prohibits the government from discriminating against speech because of its content, and to for that reason provides First Amendment protection to speech that is specifically religious.

Looking to the first situation, in a series of cases going back to the 1940's, the Jehovahs' Witnesses, a minority religion that interprets the Bible very literally and that engages in proselytizing as a matter of religious devotion, have succeeded in invalidating laws and practices that interfered with the expression of their religious beliefs and with their proselytizing. The following First Amendment cases are the result of constitutional litigation involving the Jehovah's Witnesses. The state may not require children attending public schools to participate in the Pledge of Allegiance to the American flag.<sup>62</sup> The state may not require a person to display an automobile license plate carrying an ideological message with which that person disagrees.<sup>63</sup> A city may not impose an absolute ban on knocking on a door or ringing a resident's doorbell in order to deliver an ideological message unless the resident has affirmatively indicated an unwillingness to be disturbed.<sup>64</sup> Laws requiring a license to engage in acts of expression have been held to violate the First Amendment unless they contain narrow, objective, and definite standards, so that the licensing official has no discretion to refuse the license because of the content of the speech.<sup>65</sup> A city may not require persons to obtain a permit prior to engaging in

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<sup>60</sup> See Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. STATE L.REV. 377

<sup>61</sup> As to the constitutional doctrine applicable to First Amendment claims, see generally Robert A. Sedler, *The First Amendment in Litigation: The Law of the First Amendment*, 48 WASH. & LEE L.REV. 1 (1991).

<sup>62</sup> *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

<sup>63</sup> *Wooley v. Maynard*, 430 U.S. 705 (1977).

<sup>64</sup> *Martin v. City of Struthers*, 319 U.S. 141 (1943).

<sup>65</sup> *Lovell v. City of Griffin*, 303 U.S. 444 (1938). For application of this holding to cases not involving Jehovah's Witnesses, see *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610 (1976). In another case not involving a Jehovah's Witness as a party, the Court held that a city may not impose an absolute ban on the distribution of leaflets in the public streets or public places. *Schneider v. New Jersey*, 308 U.S. 147 (1939). This holding protects the distribution of religious literature in the public streets in the same way is it protects the distribution of all literature in the public streets.

door-to-door advocacy and to display on demand the permit containing the individual's name.<sup>66</sup> More recently, the Hare Krishnas, a religious group that seeks to spread its message to airport travelers, has obtained Supreme Court rulings that the state may not ban "all First Amendment activity" in the concourse of a publicly-owned airport terminal,<sup>67</sup> and may not prohibit the distribution of literature in the concourse.<sup>68</sup>

These cases involve the application of general First Amendment doctrine, and the results in these cases necessarily extend beyond the protection of religious speech. The point that I want to make at this juncture is that religious groups have used the First Amendment's guarantee of freedom of speech to protect their religious speech, and as they have succeeded in their First Amendment claim, they have also succeed in protecting their religious liberty and that of other religious adherents.

In the second situation, the Establishment Clause principle of complete official neutrality toward religion interacts with the First Amendment principle of content neutrality. Because the Establishment Clause requires neutrality not hostility toward religion, the state in some circumstances may include the religious with the secular in the receipt of governmental benefits.<sup>69</sup> One of these circumstances is when the state opens up public facilities for use by individuals and organizations. The state's inclusion of individuals and organizations wishing to use the facilities for religious purposes in such access does not violate the Establishment Clause. At this point, the First Amendment principle of content neutrality comes into play, and this principle *requires* that the facilities be made open equally to individuals and organizations that wish to use the facilities for religious purposes.<sup>70</sup>

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<sup>66</sup> Watchtower Bible & Tract Society of New York v. Village of Stratton, 536 U.S. 150 (2002).

<sup>67</sup> Board of Airport Commissioners v. Jews for Jesus, 482 U.S. 569 (1987).

<sup>68</sup> International Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992). That case also held, however, that the state may prohibit solicitation and receipt of funds in the concourse. See also Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981), where the Court upheld as a reasonable time, place and manner regulation a requirement that the sale or distribution of merchandise, including written materials, at a state fair take place only from a booth on the fairground, and not on the fairground itself. Booths were available free of charge, to all groups on a first-come, first serve basis.

<sup>69</sup> See the discussion, *supra*, note 24, and accompanying text.

<sup>70</sup> For illustrative cases, *see*: Widmar v. Vincent, 454 U.S. 263 (1981) (public university may not exclude student group wishing to use a university-created public forum for religious worship and discussion); Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993) (where school district permitted after-hours use of school facilities for "social, civic and recreational purposes by private organizations, it could not prohibit such use of school facilities by private organization for the showing of a film "considering family life and childrearing from Christian perspective"); Capitol Square Review Advisory Board v. Pinette, 515 U.S. 753 (1995) (where the plaza in front of the state capitol building had been dedicated as a public forum, the state could not exclude a Christmas season display of a Christian cross); Good News Club v. Milford Central School, 533 U.S. 98 (2001) (where school district allowed after-school use of its facilities for "instruction in education, learning and the arts" and "social, civic, recreational and entertainment uses pertaining to the community welfare," it could not deny access to a private Christian organization that wanted to use the facilities for religious activities for children); Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (where public university paid printing costs of student publications, it could not refuse to pay printing costs of religiously-oriented student publication). And because public schools cannot constitutionally discriminate against religious speech, it is not violative of the Establishment Clause for Congress to prohibit school districts receiving federal funds from discriminating against religiously-oriented groups in regard to

We see then that the First Amendment's guarantee of freedom of speech, which provides extensive protection all forms of speech, necessarily embraces religious speech within its protective scope. Thus, the guarantee of freedom of speech has served to add to the protection of religious liberty under the American Constitution.

### **The Affirmative Protection of Religious Liberty: The Interaction of the Establishment Clause and the Free Exercise Clause**

This brings me to what I think is the most interesting part of the constitutional protection of religious liberty in the United States: the affirmative efforts on the part of the government to protect the religious liberty of individuals and religious institutions. Here we see the interaction of the Establishment Clause with the Free Exercise Clause to advance the *constitutional value* of religious liberty. The operative principle in this area may be stated as follows. Governmental action that has the effect of providing a preference for religion over non-religion violates the Establishment Clause. But governmental action that is precisely tailored to protect the religious liberty of individuals and religious institutions does not violate the Establishment Clause. The crucial question in these cases, therefore, is whether the governmental action is an unconstitutional preference for religion, or a precisely tailored and so constitutionally permissible means of protecting the religious liberty of individuals and religious institutions.<sup>71</sup>

Let me explain why this is so. When the government gives a preference for religion over non-religion, it is violating the overriding principle of the Establishment Clause, which is that the government must pursue a course of complete official neutrality toward religion. This overriding principle is not obviated by the claim that the government is trying to make an "accommodation" for religion. It is precisely because the overriding principle of the Establishment Clause is one of complete official neutrality toward religion that the government may not make an "accommodation" for religion by giving a preference for religion over non-religion. Thus, the Court has found a preference for religion in violation of the Establishment Clause in the following cases: a state law providing an exemption from the state sales tax for religious periodicals alone;<sup>72</sup> a state law that gave churches the power to prevent the issuance of a liquor license to a business that would be located within 500 feet of the church;<sup>73</sup> a state law setting up a special school district embracing the boundaries of a religious community;<sup>74</sup> and a state law entitling an employee to take off work on the day that the employee stated that he or she observed as the Sabbath, without any requirement that the employee's religion precluded the employee from working on the Sabbath or even that the employee used that day for religious purposes.<sup>75</sup>

Conversely, when the government takes action that is precisely tailored to protect the

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access to school facilities. *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

<sup>71</sup> I have discussed this interaction more fully in Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, *supra*, note 11 at 1419-1437.

<sup>72</sup> *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

<sup>73</sup> *Larkin v. Grendel's Den*, 459 U.S. 116 (1982).

<sup>74</sup> *Board of Education v. Kiryas Joel Village School District*, 512 U.S. 687 (1994).

religious liberty of individuals and religious institutions, the government is acting to protect the religious liberty that is the primary concern of both the Establishment Clause and the Free Exercise Clause. Since religious liberty is a favored value in the American constitutional system, it would be inconsistent with the overriding purpose of the religion clauses, taken together, to hold that the Establishment Clause precludes the government from taking such action. It is irrelevant in this regard that the failure of the government to take such action would not violate the Free Exercise Clause. The measure of what the government cannot constitutionally do is not the measure of what the government is constitutionally permitted to do. So long as the government's action is precisely tailored to protect the religious liberty of individuals and religious institutions, that action advances the overriding purpose of the religion clauses and so does not violate the Establishment Clause.

In order to satisfy the standard of "precisely tailored to protect the religious liberty of an individual or religious institution," the action must be directed toward obviating an interference with religious liberty for which the government is responsible. An interference with an individual's religious liberty for which the government is responsible occurs when the government prevents the individual from doing something that his or her religion requires, such as when the law prohibits a member of the Native-American Church from using peyote in a religious ceremony, or when the law compels a person to do something that the person's religion prohibits, such as denying the person a benefit unless the person agrees to work on the Sabbath, which the religion dictates be a day of complete rest. An interference with the liberty of a religious institution occurs when the law prevents the institution from carrying out its religious function, such as a law prohibiting a religious institution from employing only its adherents in the religious activities of the institution, or a zoning law prohibiting the construction of a religious facility in a residential area.

Applying the standard of "precisely tailored to protect the religious liberty of an individual or religious institution," the courts have upheld a number of governmental actions directed toward protecting religious liberty against Establishment Clause challenge. The Supreme Court has upheld Title VII's "religious entities" exemption,<sup>76</sup> which exempts religious institutions from Title VII's religious discrimination prohibition and permits them to employ individuals of the same religion to carry out the work of the institution, including the institution's non-profit secular activities.<sup>77</sup> The Court has also held that Title VII's prohibition against religious discrimination<sup>78</sup> requires an employer to make a "reasonable accommodation" for an employee's religious beliefs, so long as this can be done without undue hardship on the conduct of the employer's business.<sup>79</sup> It may be noted that the "reasonable accommodation" provision has

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<sup>75</sup> *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

<sup>76</sup> 42 U.S.C. sec. 2000e-1.

<sup>77</sup> *Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

<sup>78</sup> 42 U.S.C. sec. 2000e-2(a)(1).

<sup>79</sup> *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).



been interpreted very narrowly so as to meet the “precisely tailored” standard and so be constitutionally permissible. For example, an employer was not required to accommodate a Sabbatarian’s effort to avoid Saturday work when this would require the employer to disregard the seniority system that had been provided for in the collective bargaining agreement.<sup>80</sup> An example of a required “reasonable accommodation” is where two Jewish employees of a skin care salon had made a request two weeks in advance that they be permitted to take off work on Yom Kippur, the holiest Jewish holiday, and where the employer could have reassigned or rescheduled their previously-booked appointments.<sup>81</sup> Another example of a “reasonable accommodation” is the “substituted charity” provision of federal labor relations law, which enables persons who have religious objections to joining unions to avoid paying union dues or representation fees and instead make a charitable contribution in an equivalent amount.<sup>82</sup>

Other permissible actions designed to protect the religious liberty of individuals actions include: an exemption from the former Sunday closing laws for Sabbatarians who closed their businesses on Saturday;<sup>83</sup> during Prohibition the exemption for sacramental wine used in religious services, and a modern equivalent, the exemption from the federal substance abuse laws for the use of peyote in the religious ceremonies of Native-American tribes;<sup>84</sup> an exemption from the federal Eagle Protection Act to permit members of Native-American tribes to use eagle feathers in their religious services;<sup>85</sup> the exemption in the federal Humane Slaughter Law for Jewish religious slaughter and now for Halal religious slaughter and for that of all religious faiths that use the severance of the carotid artery method of slaughter;<sup>86</sup> an exemption from social security self-employment taxes for members of religious sects that have tenets opposed to

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<sup>80</sup> *Id.*

<sup>81</sup> See *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7<sup>th</sup> Cir. 1997).

<sup>82</sup> See *e.g.*, *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9<sup>th</sup> Cir. 1981).

<sup>83</sup> See *e.g.*, *Commonwealth of Kentucky v. Arlan’s Dep’t. Store*, 357 S.W.2d 808 (Ky.1962), *appeal dismissed*, 371 U.S. 218 (1962). In *Braunfeld v. Brown*, *supra*, note 57, where the Court held that the state’s failure to provide such an exemption did not violate the Free Exercise Clause, the Court noted that a number of states did provide such an exemption, and said that, “this may well be the wiser solution to the problem.” 366 U.S. at 608.

<sup>84</sup> See *e.g.*, *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5<sup>th</sup> Cir. 1991); *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C.Cir. 1989).

<sup>85</sup> See *Rupert v. Director, United States Fish and Wildlife Service*, 957 F.2d 32 (1<sup>st</sup> Cir.1992). In this case, the exemption for the use of eagle feathers for religious purposes by members of Native-American tribes was challenged by a member of an “all-race” church that followed Native-American religious customs, including the ceremonial use of eagle feathers. They asserted that the exemption constituted a preference for one religion over another, but the court was able to avoid the religious preference claim by finding that the exemption was based on the sovereignty of the Native-American tribes and their special relationship to the federal government. 957 F.2d at 33-35. *Cf.* *Morton v. Mancari*, 417 U.S. 535 (1974) (the federal government may give employment preference to members of Native American tribes in the Bureau of Indian affairs). The courts have also relied on the sovereignty and special relationship justification to avoid the religious preference claim in the peyote use cases, *supra* note 84. If the peyote exemption had been for use by all religious groups, as opposed to ordinary drug users, there would be no question but that it would be a constitutionally permissible means of protecting the religious liberty of individuals and religious institutions. In *Gonzales v. O Centro Esp.Benef. Uniao Do Vege.*, *infra*, note 103, the Court referred to the “well-established peyote exception” and noted that this exception “fatally undermines the Government’s broader contention that the Controlled Substances Act establishes a closed regulatory system that admits neof no exceptions under RFRA.” 546 U.S. at 434-435..

participation in the social security system and that provide reasonable support for their dependent members;<sup>87</sup> and an exemption for Amish buggies from the requirement that slow-moving vehicles display a special emblem.<sup>88</sup> And, of course, the government may take actions to protect the religious liberty of persons subject to governmental control, such as the Dearborn, Michigan public schools making arrangements for their Moslem students to pray at required times during school hours, and the military and prison systems trying to accommodate the religious needs of persons under their control by providing them with chaplains, releasing them for religious services, excusing them from uniform requirements, and enabling them to observe religious dietary restrictions.<sup>89</sup>

This brings us to the Religious Freedom Restoration Act of 1993 (RFRA)<sup>90</sup> and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).<sup>91</sup> In an effort to overcome the Supreme Court's narrow interpretation of the Free Exercise Clause and protect the religious liberty of individuals and religious institutions,<sup>92</sup> Congress enacted the Religious Freedom Restoration Act of 1993. The Act applied to all federal and state laws and provided that whenever any law "substantially burdened" a person's exercise of religion, the government had to demonstrate that the law was in the furtherance of a compelling governmental interest and that it was the least restrictive means of advancing that interest. This would be so even if the "substantial burden" on a person's exercise of religion resulted from a rule of general applicability. In 1997, the Supreme Court held that the Act was unconstitutional in its application to the states as being beyond Congress' enforcement power under section 5 of the Fourteenth Amendment.<sup>93</sup> In 2000, Congress came back with RLUIPA, a much narrower law enacted under the spending power, and applicable only to programs or activities receiving federal assistance. RLUIPA imposes the compelling governmental interest test to determine the validity of land use regulations that impose a substantial burden on the religious exercise of a person or religious institution and the validity of institutional regulations that impose a substantial burden on the religious practices of institutionalized persons.

In *Cutter v. Wilkinson*,<sup>94</sup> the Supreme Court reviewed a lower court decision holding that

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<sup>86</sup> See *Jones v. Butz*, 374 F.Supp.1284 (S.D.N.Y. 1974).

<sup>87</sup> See *Droz v. Commissioner of IRS*, 48 F.3d 1120 (9<sup>th</sup> Cir. 1995).

<sup>88</sup> See *State v. Hershberger*, 462 N.W.2d 393 (Minn.1990), holding that such an exemption was required by the state constitution and did not violate the Establishment Clause.

<sup>89</sup> See e.g., *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir.1985), rejecting an Establishment Clause challenge to the military chaplaincy. Congress has by statute overturned the headgear regulation upheld against Free Exercise challenge in *Goldman v. Weinberger*, *supra*, note 53, so as to permit the wearing of religiously-required headgear by military personnel. See 10 U.S.C. sec. 774 (1994).

<sup>90</sup> 42 U.S.C. sec. 2000bb *et seq.*

<sup>91</sup> 42 U.S.C. sec. 2000cc *et seq.*

<sup>92</sup> Specifically the Court's decision in *Employment Division v. Smith*, *supra* note 49. In *Smith* the Court held that the Free Exercise Clause does not prohibit the government from burdening religious practices through generally applicable laws, and that laws imposing such a burden did not have to be justified under the exacting compelling governmental interest standard of review.

<sup>93</sup> *Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>94</sup> 544 U.S. 709 (2005).

that in its application to prison inmates, RLUIPA violated the Establishment Clause, because it favored religious rights over other fundamental rights without any showing that religious rights were at any greater risk of deprivation in the prison context.<sup>95</sup> The Supreme Court unanimously reversed that decision held that the application of RLUIPA to protect the religious practices of the prison inmates that were at issue in that case did not violate the Establishment Clause. The Court first noted that, it “has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause,” and that ““there is room for play in the joints between ‘ the Free Exercise Clause and the Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.”<sup>96</sup> It then noted that Congress had documented in hearings spanning three years that ““frivolous or arbitrary” barriers impeded institutionalized persons’ religious exercise.”<sup>97</sup> The Court then found that on its face, RLUIPA “qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.”<sup>98</sup> This was because it “alleviates exceptional government-created burdens on private religious exercise” and “protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the governments permission and accommodation for exercise of their religion.”<sup>99</sup> Moreover, RLUIPA would be applied in an “appropriately balanced way with particular sensitivity to security concerns.”<sup>100</sup> Finally, the Court concluded that the lower court had misunderstood the Court’s precedents when it held that the government could not give greater protection to religious rights than to other constitutionally protected rights. If this were the law, said the Court, “all manner of religious accommodations would fail,” and the Court had held in other cases, most notably *Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Amos*,<sup>101</sup> that religious accommodations need not “come packaged with benefits to secular entities.”<sup>102</sup> The Court thus upheld against Establishment Clause challenge the provisions of RLUIPA requiring the state to make a reasonable accommodation for the religious needs of institutionalized persons. The Court’s

decision in *Cutter v. Wilkinson* strongly affirms the principle that the government can, consistent with the Establishment Clause, take action that is precisely tailored to protect the religious freedom of individuals and religious institutions.<sup>103</sup>

<sup>95</sup> *Cutter v. Wilkinson*, 423 F.3d 579 (6<sup>th</sup> Cir. 2005), *rev’d*, 544 U.S. 709 (2005).

<sup>96</sup> 544 U.S. at 713, citing *Hobbie v. Unemployment Appeals Commission of Florida*, *supra* note 54 at 144-145, and *Locke v. Davey*, 540 U.S. 712,718 (2004). In *Locke* the Court held that although the state would not be violating the Establishment Clause if it permitted state scholarship funds to be used for theology courses, the state did not violate the Free Exercise Clause by prohibiting the use of state scholarship funds for this purpose.

<sup>97</sup> *Id.* at 716.

<sup>98</sup> *Id.* at 720.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 722.

<sup>101</sup> *Supra*, note 77.

<sup>102</sup> 544 U.S. at 724, citing *Amos*, 483 U.S. at 338.

<sup>103</sup> For illustrative cases involving the application of RLUIPA’s land use provisions, see *Guru Nanak Sik Society of Yuba City v. County of Sutter*, 456 F.3d 978 (9<sup>th</sup> Cir. 2006) (Application of RLUIPA to state and local government

## Conclusion

In this writing, I have tried to demonstrate that the overriding purpose of the religion clauses, taken together, is to protect religious liberty in the United States. The Establishment Clause protects religious liberty by prohibiting the government from taking action that advances or inhibits religion and it interacts with the Free Exercise Clause to provide affirmative protection for the religious freedom of individuals and religious institutions. I believe that on the whole, the overriding purpose of the Religion Clauses has been achieved, and that at this point in time, religious liberty is very secure in the United States.

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is constitutional as an exercise of Congress’ power to enforce constitutional rights against the states; denial of a religious group’s application to construct a temple on a parcel of land zoned as “agricultural” violates RLUIPA); *Konikov v. Orange County, Florida*, 410 F.3d 1317 (5<sup>th</sup> Cir. 1317) (denial of zoning permit to hold religious services in private home while permitting non-religious organizations to hold meetings in private homes violates RLUIPA); *St. John’s United Church of Christ v. The City of Chicago*, 502 F.3d 616 (7<sup>th</sup> Cir. 2007) (exercise of eminent domain power is not a “land use regulation” within the meaning of RLUIPA, so law does not apply to the government’s taking of church property for public use).

In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418(2006), the Court applied RFRA to invalidate the application of Schedule I of the Controlled Substances Act, 21 U.S.C. sec. 812(c), Schedule I (c) to the use of hoasca, a tea containing a hallucinogen, in the religious ceremonies of a very small sect in the United States. The Court held that RFRA and RLIUPA require case-by-case consideration of religious exemptions to generally applicable rules and that the government bears the burden of demonstrating that serious harm would result from the granting of specific exemptions to particular religious claimants. The government could not sustain its burden in this case, just as the state prison system could not sustain the burden in *Cutter v. Wilkinson*. The Court also referred to the “well-established peyote exception,” discussed earlier, *supra*, notes 82-83, and accompanying text, and noted that this exception “fatally undermines the Government’s broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA.” 546 U.S. at 433-435.

Employment Division v. Smith, 494 U.S. 872 (1990).  
Cutter v. Wilkinson, 544 U.S. 709 (2005).

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